NO. 49453-1-II

IN THE COURT OF APPEALS OF THE STATE OF

WASHINGTON DIVISION II

END PRISON INDUSTRIAL COMPLEX
Appellant/Plaintiff,

v.

KING COUNTY
Appellee/Defendant

APPEAL FROM THE SUPERIOR COURT
FOR PIERCE COUNTY
THE HONORABLE JUDGE CUTHBERTSON

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

King County uses the complexity of the property tax system to confuse this case and the simple issues before this Court. This case is not about the duration of a levy or "magic words." Simply put, the County admits that it employed a methodology for calculating its levy that is explicitly prohibited by statute. The only way that the County can legally use this methodology is if the voters approve a ballot proposition that "expressly states" that the otherwise-prohibited methodology will be used. This is an issue of law that must be resolved in appellant EPIC's favor because the ballot title for King County Proposition One ("Prop. 1") did not expressly state that the methodology would be used, as required; it did not even impliedly propose its use.

This case has always been about whether King County set its property tax levy in excess of that allowed under RCW 84.55.010. That statute adopts a two-step methodology for calculating the maximum levy that a taxing district can assess in any given year. Essentially, a taxing district takes the highest levy amount in the previous three years, and then increases it by 1% plus a multiplier for new construction. RCW 84.55.050 allows voters to authorize taxes in excess of this "lid" on property taxes, and includes specific rules for how to calculate the levy limitation under RCW 84.55.010 following a levy lid lift.

Here, King County admits that in 2014 and subsequent years, the King County Council set rates using a particular methodology that is explicitly prohibited under RCW 84.55.050. The County calculated the 2014 amount based upon the dollar amount of the 2013 levy *as lifted*, rather than based upon what the 2013 dollar amount would have been if the voters had not approved the levy lid lift (referred to herein as the "2013 proxy"). State statute prohibits King County from using this methodology unless voters expressly approved it on the ballot.

Here, Prop. 1 said nothing whatsoever about using the otherwise-prohibited methodology for calculating the levy, so it cannot constitute express voter approval of that methodology. By using the prohibited methodology, the King County Council set a levy for 2014 and later years that exceeded the limitation of RCW 84.55.010.

The County's over-collection of taxes cannot be immunized from judicial review because the County disagrees with EPIC politically or because EPIC did not exist in 2012. RCW 84.55.010 and .050 were enacted to protect all those who pay property taxes.

Nor did taxpayers have the obligation to bring a ballot title appeal in 2012 in anticipation that someday King County might implement the Prop. 1 levy in a manner that contradicts the ballot title and violates RCW 84.55.010. King County seems to argue that even if Appellant is correct,

and its tax collections are illegal, the County can continue to levy the illegal taxes for years to come because nobody noticed and/or challenged the County's over-collection of taxes until recently. This is obviously not the law. Appellant is not seeking a refund of past collections, but the County cannot continue to over-collect taxes into the future simply because levy calculations are so complicated that the County got away with its over-collection for a couple of years.

II. ARGUMENT IN REPLY

A. King County Council set 2014 and later property taxes in excess of the statutory limit by using an improper methodology.

Because the County presents a confusing and inaccurate description of the applicable law, Appellant will briefly lay out the actual statutory regime.

Appellant contends that King County's 2014 and later levies violated RCW 84.55.010, which limits the total regular property tax levy that a jurisdiction can levy. Under RCW 84.55.010, "The levy for a taxing district in any year ***must be set so that the regular property taxes payable in the following year [do] not exceed***" the statutory limitation set forth in that section. RCW 84.55.010. Here, the County Council set the levy in 2014 and later years based upon an illegal methodology, causing the levy to exceed that permitted under RCW 84.55.010.

1. King County is improperly implementing the first step in the levy limit calculation under RCW 84.55.010.

RCW 84.55.010 creates a two-step methodology for calculating the maximum levy that a jurisdiction can impose in any given year:

Step One: Identify the base levy amount. The district first determines the "amount of regular property taxes lawfully levied for such district in the highest of the three most recent years." RCW 84.55.010.

Step Two: Increase the base levy with various multipliers. The base levy amount identified in Step One is then increased by applying two multipliers: the statutory limit factor (generally 101%, or a 1% increase) and a multiplier for increased land values based on new construction and improvements and certain enumerated factors. *Id.*

The County must conduct this calculation each year to set property taxes.

The legal issue in this case is whether the County Council properly performed the first step in this process for tax years 2014 and beyond.

Where, like here, there has been a levy lid lift, Step One in the calculation is governed by RCW 84.55.050(3), (4)(a), and (5).

RCW 84.55.050 provides, "After a levy authorized pursuant to this section is made, the dollar amount of such levy may not be used for the purpose of computing the limitations for subsequent levies provided for in

this chapter, unless the ballot proposition expressly states that the levy made under this section will be used for this purpose." RCW 84.55.050(3). "If expressly stated, a proposition placed before the voters . . . may . . . use the dollar amount of a levy under subsection (1) [single year levy lid lift], or the dollar amount of the final levy under subsection (2) [multi-year levy lid lift] for the purpose of computing the limitations for subsequent levies provided for in this chapter." RCW 84.55.050(4)(a). Otherwise, if no such express statement is approved by voters, "subsequent levies shall be calculated as if [the levy lid lift proposition] had not been approved. RCW 84.55.050(5)

Thus, RCW 84.55.050 creates a default rule that specifically prohibits the methodology that the County Council used to set the Prop. 1 levy beginning in 2014. That default rule prohibited the County from using the ***actual*** 2013 levy amount in the first step of the calculation. But this is precisely what King County admits to doing.

The County admits, and the Court can judicially notice, that on February 4, 2014, the King County Council set the amount of property taxes to be collected in 2014. The County admits that the decision relied upon a methodology that used the dollar amount of the 2013 levy – which was elevated by the single year lid lift – to calculate the 2014 levy. Resp. at 14.

However, under the default rule of RCW 84.55.050(3), the County was prohibited from using the 2013 collections in "Step One" of the methodology. Instead, under RCW 84.55.050(5), the maximum 2014 levy should have been calculated as if Prop. 1 "had not been approved" and as if King County "had made levies at the maximum rates which would have been allowed" in 2013. In other words, the 2014 levy limit needed to be computed based upon a "2013 proxy" amount (the maximum amount that could have been collected absent the levy lid lift) rather than the actual dollar amount collected under the 2013 levy (which was elevated due to the lid lift).[1]

Again, King County admits that it calculated the 2014 levy by applying the limit factor to the actual 2013 levy amount; the County did not calculate the 2014 levy as if Prop. 1 had not been approved. Under RCW 84.55.050(3), the methodology the County used is allowed only if voters expressly authorized it. Here, voters did not do so.

2. The "express" statutory requirement must be heeded.

[1] This methodology is explained visually in the chart at page 22 of EPIC's opening brief. EPIC does not suggest that ballot title should be interpreted to mean that the 2014 levy amount is computed by multiplying the limit factor by $0. Rather, under the law, the 2014 levy amount would have been computed by multiplying the limit factor by the 2013 proxy amount.

As discussed in the opening brief, the statute three times states that the proposition must "expressly" authorize the methodology in question to overcome the rule prohibiting such methodology. The Court could not ignore this mandate even if it was only included once, and certainly cannot ignore it when the Legislature deemed it important enough to state three times.

Yet, the County does ask the Court to disregard the Legislature's clear language and supplant it with a test that asks whether a well-informed voter could understand that the County intended to use the otherwise-prohibited methodology. This argument must be rejected to respect the Legislature's use of the word "expressly" on three occasions in RCW 84.55.050. *Cherry v. Metro. Seattle*, 116 Wn.2d 794, 799 (1991) ("A court interprets a statute so as to give effect to the Legislature's intent in creating the statute."). *See also Crosby v. Spokane County*, 137 Wn.2d 296, 302 (1999) (The key to achieving substantial compliance with a procedural statute is the satisfaction of the essential purpose of the statute).

To the extent the Court finds any ambiguity in the statute, it "must be construed most strongly against the taxing authority." *Group Health Coop. v. Dep't of Revenue*, 106 Wn.2d 391, 401 (1986).

3. The voters did not authorize the use of the prohibited methodology.

Prop. 1 did not "expressly state" that the dollar amount of the 2013 levy would "be used for the purpose of computing the limitations for subsequent levies" and thus the voters did not authorize use of that otherwise-prohibited methodology. RCW 84.55.050(3). Indeed, Prop. 1 said nothing whatsoever about whether or how the 2013 levy would be used in calculating future levies.

Appellant does not claim that RCW 84.55.050 requires "magic words" or that there is only one way to write a proposition to expressly authorize the otherwise-prohibited methodology. The issue in this case is that Prop. 1, the only proposition before this Court, did not constitute the requisite express authority.

a. The ballot title's statement of limited duration does not expressly authorize the prohibited methodology.

The County's argument that the Prop. 1 ballot title stated there would be "an additional property tax for nine years" misses the point. Resp. at 1. True, this told voters that for nine years the County would be dedicating *some amount* of additional taxes to fund a "Children and Family Services Center" capital project. But the fact that voters knew the duration is irrelevant to the issue in this case, which is whether the voters expressly

approved the otherwise-prohibited methodology for calculating levy *amounts* in years two through nine.

In addition, the statute forecloses the County's argument that merely mentioning that taxes would be allocated to the project for a limited duration is sufficient to authorize the otherwise-prohibited method. RCW 84.55.050(4)(b) allows King County to limit the duration of its levy, whereas subsections (3), (4)(a), and (5) require express voter approval to use the otherwise-prohibited methodology for calculating levies. If stating the duration was sufficient, the Legislature would not have three times stated the specific ballot title requirements in subsections (3), (4)(a), and (5).

b. The ballot title's statement that "increases in the following eight years" would be subject to chapter 84.55 does not expressly (or impliedly) authorize the prohibited methodology.

The ballot title's sentence "Increases in the following eight years would be subject to the limitations in chapter 84.55 RCW, all as provided in Ordinance 17304" neither expressly nor impliedly approves the County's use of the otherwise-prohibited methodology. It says ***nothing whatsoever*** about whether and how the 2013 levy amount would be used to calculate future years' levy limits. It merely indicates that there could be increases relative to 2012. Because the phrase does not actually answer the

methodology question at all, it cannot be read to "expressly state" that the otherwise-prohibited methodology would be used.

i. The "increasing" phrase does not expressly approve of any methodology for calculating levies.

King County emphasizes the ballot title's use of the word "increases" but that word does not provide any clarification, much less rise to the level of "expressly stating" how subsequent levies would be calculated. That is because property taxes are permitted to increase in years two through nine under both the default methodology and under the method that is prohibited unless expressly authorized. Specifically, under the default rule, the 2012 levy is increased to create the "2013 proxy" amount, and then the "2013 proxy" amount is increased further to calculate the maximum 2014 levy, and so on for the nine year duration that the County is setting aside funds for Prop. 1. RCW 84.55.050(5), .010.[2]

Certainly, if the County wanted to use the 2013 levy amount in calculating later years' levies, it could have crafted a ballot title to obtain express voter approval for that methodology. The Court need look no further than King County's ordinance that included a draft ballot title for Prop. 1 for an example of such express permission. It stated "The 2013 levy

[2] This discussion assumes that levies in King County escalate annually, which was the case in the years in question.

amount would become the base upon which levy increases would be computed for each of the eight succeeding years." Ordinance 17304, Section 7. However, the final Prop. 1 ballot title omitted the Ordinance's sentence seeking express voter approval under RCW 84.55.050. [3]

The proposed ballot title was the Ordinance's ***only*** discussion of the methodology to be used for calculating subsequent levies. Thus, when the County dropped this sentence from the ballot title, it became a legal nullity.

In sum, the operative ballot title's statement that "increases in the following eight years would be subject to" statutory limits is not an "express statement" that subsequent years' levies would be based on and exceed the 2013 levy amount. The County cannot delete the express statement from the ballot title, replace it with a vague statement that future increases will comply with the law, and still claim compliance with the express approval requirement. Indeed, if the ballot title contained a sufficient express statement, the County would not be arguing over the "reasonableness" of how "voters interpreted the ballot proposition." Resp. at 28.

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[3] This was the only significant change between the Ordinance's proposed ballot title and the final Prop. 1 ballot title. Contrary to the County's suggestion, any challenge in meeting the seventy-five word limit for ballot titles cannot excuse the County's absolute failure to comply with the express approval requirement. See Resp. at 27-28. Regardless, the County does not dispute that it could easily have edited the Ordinance's proposed ballot title to meet the word limit without losing any substance.

ii. Stating that increases over eight years will be governed by Chapter 84.55 does not even impliedly approve use of the otherwise-prohibited methodology.

The phrase in question does not even impliedly condone the use of a particular methodology for calculating future levies. The phrase merely states the legal truism that subsequent property tax increases are governed by Chapter 84.55. Nothing in the phrase even suggests that the levy would increase from 2013 to 2014 or in any given year. It references increases "in the following eight years," not in each of the following eight years, and does not specify increases relative to 2013.

The phrase would be true even if the County used the default rule and calculated the 2014 levy based upon a "2013 proxy," rather than on actual 2013 collections. Over the course of the eight years, increases to the King County levy would still be governed by Chapter 84.55 RCW. For example, as described above, the 2014 levy would be calculated by increasing the 2012 levy amount to obtain a "2013 proxy," and then the standard statutory multipliers (as defined in RCW 84.55.010) would be applied to the "2013 proxy" to obtain the 2014 maximum levy.

Also, the words "all as provided in Ordinance 17304" undercuts the implied approval argument. The Ordinance does not contain any reference

to how later levies will be calculated except in one sentence of the proposed ballot title, which the County abandoned in the final ballot title.

c. The Court's analysis of what voters authorized should be confined to the ballot title.

RCW 84.55.050 plainly and repeatedly states that it is the "ballot proposition" "placed before voters" that must contain the express statement that the otherwise-prohibited methodology would be used. The County therefore cannot rely upon extrinsic evidence such as the voters' pamphlet to support its defense. Even where there is no such statutory requirement, the courts have held that the sufficiency of the ballot title cannot be bolstered by extrinsic evidence. This case law is alternately ignored and misinterpreted by the County.

Namely, the County ignores *Amalgamated Transit Union Local 587 v. State*, in which the Supreme Court reaffirmed "the particular importance of [the] requirement" to confine the analysis to the ballot title because "often, voters will not reach the text of a measure or the explanatory statement, but may instead case their votes based upon the ballot title." 142 Wn.2d 183, 217 (2001).

Similarly, in *State Grange v. Locke*, 153 Wn.2d 475 (2005), the court held that in determining whether a proposition's or bill's title embraces the subject of the underlying legislation "[t]he title must be

construed with reference to the language used in the title only *and not in light of the context of the act*." *Id.* (emphasis in original) (citing *Great N. Ry. Co. v. Cohn*, 3 Wn.2d 672, 680 (1940)). While these cases arise in the context of constitutional subject-in-title challenges, their reasoning and holdings are equally apt here. Thus, the Court should look only to the ballot title to see whether it expressly authorized the use of the challenged methodology.

Furthermore, the County cites *Spokane v. Taxpayers of Spokane,* 111 Wn.2d 91 (1988), to assert that "contrary to EPIC's assertions," courts should not assume that voters did not read the materials accompanying a ballot title. *Taxpayers of Spokane* does not say this anywhere. In fact, this case states at the page cited by the County, "[i]n determining voters' intent, courts should not read into an initiative 'technical and debatable legal distinctions' not apparent to the average informed lay voter." 111 Wn.2d 91, 97.

Finally, the only case cited by the County to support its assertion that the Court should look to extrinsic evidence to interpret the ballot title, *Sane Transit v. Sound Transit*, 151 Wn.2d 60 (2004), is inapposite. *Sane Transit* considered whether the text of the resolution or text from the ballot title, voters' pamphlet, and explanatory statement should be considered the enabling legislation of a proposed project. *Id.* at 69. The plaintiff argued

that because the full text of the resolution was never sent to voters, that the ballot title, the voters' pamphlet, and the explanatory statement should serve as the enabling legislation. *Id.* at 71. The court concluded that because the ballot title referenced the resolution, even though the full text of that resolution was never sent to voters, the resolution itself should serve as the enabling legislation. *Id.* at 72. Here, there is no question over what constitutes the enabling legislation of the project. The question here is whether the ballot expressly stated that the otherwise-prohibited methodology would be used. *Sane Transit* is inapposite.

B. The challenge to the levy could not have been brought as a ballot title appeal.

As detailed in Appellant's opening brief, there are numerous reasons why Appellant could not have challenged the County's over-collection of property taxes as part of a ballot title challenge before the 2012 vote on Prop. 1.

1. A ballot title appeal cannot enforce the tax code.

The statutory ballot title appeal process -- being decided on an expedited basis and without opportunity for appeal -- is not designed to enforce the tax codes or protect the rights of taxpayers. Indeed, such issues are beyond the jurisdiction of the court in such appeals.

The ballot title challenge statute, RCW 29A.36.090, provides only a single remedy that has no application to this type of case. Under it, the Superior Court may "certify to and file with the county auditor a ballot title that it determines will meet the requirements ***of this chapter***." (emphasis added). Thus, the court's jurisdiction in a ballot title challenge only extends to modifying the ballot title to comply with Chapter 29A RCW (election law); it does not extend to compliance with property tax statutes such as Chapter 84.55 RCW.

2. The County did not violate RCW 84.55 until 2014.

Even if there had been a venue for a case in 2012, Appellant had no claim at that time. King County did not violate RCW 84.55.010 until February 4, 2014, when the County Council set the 2014 levy using the prohibited methodology and thus exceeded the statutory limitation. *See* RCW 84.55.010 ("The levy for a taxing district in any year must be set so that the regular property taxes payable in the following year [do] not exceed" the statutory limitation).

The County admits that "for 2014, assessor's office staff applied the 101% limit factor to the previous year's levy amount and submitted to the council for approval. The council approved, setting the amount at $22,366,030." Resp. at 14. This occurred through the enactment of Ordinance 17744 on February 4, 2014. No Court could entertain a claim

that the County improperly calculated the levy prior to the Council's action. *See Walker v. Munro*, 124 Wn.2d 402, 414-15, 418 (1994) (Challenge to a tax not ripe until the tax is implemented, in effect, and paid).

Indeed, at the time that a ballot title challenge could have been brought, nobody would have suspected that the County intended to use the prohibited methodology in setting the 2014 levy. After all, the Ordinance's proposed ballot title showed that the County understood the need to obtain express voter approval to use that methodology, but the County's attorney deleted the sentence that would have sought such approval from the final ballot title. If the County still wanted the authority to use the methodology, it presumably would have insisted that the final ballot title include express authorization language. In light of this history, there was no reason to believe that there was an error in the title.

This was not a situation where the ballot title was so obviously inconsistent with Ordinance 17304's tax provisions that it should have raised alarms in 2012. The Ordinance said nothing about how future levies would be calculated except in the proposed ballot title, which was abandoned. The Ordinance also said nothing about how much money is to be collected under the levy, further obscuring things. Thus, in addition to lacking a venue and ripe claim, there was no way for a taxpayer to see that the County intended to collect taxes in excess of that allowed.

One could not bring a ballot appeal based upon the speculation that sometime in the future the County may illegally implement the levy. Such a claim would be speculative at best and probably frivolous. Even with the benefit of hindsight, the County's argument that EPIC should have filed a ballot title challenge in 2012 is untenable. If the County were correct, RCW 84.55.050 would be unenforceable and there would be nothing to stop the County from proposing one tax on the ballot and implementing another hundred-fold higher tax a few years later.

3. The post-election challenge cases EPIC cites are applicable.

As discussed in Appellant's opening brief, the courts have not required a ballot title challenge as a prerequisite to bringing a later case, even when the later case requires examination of the ballot title. Here, as discussed, Appellant's claims were not ripe until years after the ballot title was issued and a ballot title appeal could not have addressed the future possible violation of tax laws.

The County also blatantly misrepresents the holding of *Washington Association for Substance Abuse and Violence Prevention v. State ("WASAVP")* to the Court. 174 Wn.2d 642 (2012). The County claims that *WASAVP* is not applicable because it "did not involve a question of whether the ballot title accurately described what the initiative was

intended to accomplish . . . Instead, the question was question was whether the legislation itself was constitutional." Resp. at 19. In fact, *WASAVP* explicitly states that "[t]he issue is thus whether the phrase 'license fees based on sales,' found in I-1183's ballot title, is misleading or false." 174 Wn.2d at 662.[4] Thus, *WASAVP* directly stands for the proposition that the wording of a ballot title can form the basis for a post-election challenge.

The County's attempt to distinguish the other post-election cases EPIC cites similarly falls flat. EPIC cites these cases to reinforce the uncontroversial point that the courts will not hesitate to consider the legality of post-election conduct or the implementation of laws merely because doing so requires examining the authorizing ballot title. See Resp. at 20 n.3 (acknowledging "[c]ertainly the court looks to the ballot title" to determine the constitutionality of the underlying legislation).

C. The vague description of the project does not allow for an enforceable limitation on the use of the levy funds.

There is no requirement that a levy lid lift proposition contain a limited purpose. That is optional under RCW 84.55.050(4)(c). However, for that limitation to be enforceable, the limited purpose must be "expressly

[4] *WASAVP* even specifically distinguished its facts from those in *Kreidler v. Eikenberry*, 111 Wn.2d 828 (1989) on the basis that the appellants in *Kreidler* "[did] not challenge the result of the ballot title determination, but rather the constitutionality of the law itself." 174 Wn.2d at 661.

stated." RCW 84.55.050(4). Here, the ballot title's description of the project was so vague and rhetorical that it is unenforceable. However, Appellant does not claim the funds can be used for any purpose, since the ballot title stated that funds would be used to "serve the justice needs of children and families." This is clear, unlike the statement that funds would be used to "replace" the "children and family justice center" -- a facility that did not exist. Thus, the County can use the *lawful* levy proceeds (not the illegal proceeds discussed above) for other projects to serve the justice needs of children and families, including to help prevent youth detention.

III. CONCLUSION

For the reasons stated herein and in EPIC's opening brief, the Court should reverse the trial court and remand for further proceedings.

RESPECTFULLY SUBMITTED this 14th day of April, 2017.

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DECLARATION OF SERVICE

I, Katherine Brennan, hereby declare under penalty of perjury under the laws of the State of Washington that on April 14th, 2017, I caused the foregoing to be filed with the Court of Appeals, Division II and a true and correct copy of the same to be sent via email, per agreement of counsel, to the following:

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